In the
Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-901

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Appellant,

vs.

DOUGLAS DEWEY and WAUKESHA LIME AND STONE COMPANY,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF FOR THE APPELLEES

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QUESTION PRESENTED

Whether Section 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (Supp. II) 813(a), violates the Fourth Amendment insofar as it authorizes federal mine inspectors to conduct warrantless safety and health inspections of stone quarries.

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Appellant,

VS.

DOUGLAS DEWEY and WAUKESHA LIME AND STONE COMPANY,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF FOR THE APPELLEES

STATEMENT OF THE CASE

Appellees agree with the Statement of Appellants, with the following exceptions and additions:

1. Customers are permitted in only a small portion of Waukesha's 300-acre premises, namely, the road extending from the scale house located at the main entrance to

the quarry to the dust plant where buyers pick up their purchases, and the small office at the dust plant. Customers are not permitted in the area where the bag machine operators work. (J.A. 23a-24a.)

2. Railroad tracks and a spur track are located along the road which runs through the center of the property. The spur is maintained by the railroad, which brings crews onto the property to work on the rail spur. This seldom occurs. (Dewey deposition at 25-26.) The bagging stations in the dust house where the bagger operators work are not visible from the railroad tracks. (J.A. 21a.)

3. Waukesha's policy required all persons on the company premises to be accompanied by a Waukesha Lime & Stone representative. (J.A. 23a.) The state safety inspector who, in August of 1979, had inspected Waukesha's operation for six or seven years (Delaney deposition, p. 4.) followed that rule. Upon arriving at the quarry, he contacted the mine office to tell Mr. Dewey or his representative the particular purpose for his visit. (J.A. 17a-18a.) Accompanied by a Waukesha representative (J.A. 18a), he was permitted to go where he wanted to go (Delaney deposition, p. 5) and to see whatever he wished. (Delaney deposition, p. 6.)

4. State inspections were authorized by the statute providing for inspection of any business subject to Wisconsin's Worker's Compensation law. (J.A. 14a.) The first Wisconsin mining rules following the federal scheme were adopted in 1972. (J.A. 16a.)

5. At the time Waukesha Lime and Stone was purchased by its present owner, Payne & Dolan, Inc., it had been operating for many years. (Bechtold deposition, p. 5.) Payne & Dolan was aware that state inspectors inspected Waukesha's materials and equipment. (J.A. 13a.)

6. Jack Delaney, state safety inspector, has never been required to obtain a search warrant to inspect any mine. (Delaney deposition, p. 11.) Waukesha always cooperated with him. (J.A. 19a.) He considers Waukesha to be a safe place to work. (J.A. 19a.)

7. On July 10, 1978, federal mine inspector Walter Brey entered Waukesha's premises and commenced his inspection over an hour before contacting the Waukesha office. (J.A. 5a.) When he finally did so, he did not explain why he was at the quarry that day, and Mr. Dewey did not assume the reason was to see whether a previous dust problem had been fixed. (Dewey deposition, p. 22a.)

8. All references to pages 25a-29a of the Joint Appendix are references to a fact statement prepared to accompany a brief submitted to the district court by the Secretary, and which was not agreed to in any way by appellees. This statement does not always reflect accurately the sworn testimony and statements from which it was supposedly drawn. Where such inaccuracies have been cited in appellant's Statement of the Case, they have been the subjects of exceptions and additions above.

SUMMARY OF ARGUMENT

The reasonableness of warrantless administrative inspections of private property has been examined in a series of cases including *Frank* v. *Maryland*, 359 U.S. 360 (1959), *Camara* v. *Municipal Court*, 387 U.S. 523 (1967), *See* v. *City of Seattle*, 387 U.S. 541 (1967), *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970), *United States* v. *Biswell*, 406 U.S. 311 (1972) and culminating in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1979). This case, which synthesizes the general rule for determining when such searches of business establishments are constitutionally

permissible, emphasized that such instances are exceptional, and that businesses properly subject to warrantless ispections are characterized by a long tradition of close government supervision.

Waukesha Lime & Stone's quarrying business is classified as a "coal or other mine" under the Federal Mine Safety and Health Act of 1977 (Mine Act), which authorizes, as part of its enforcement mechanism, warrantless searches by mine inspectors of businesses so categorized under the act. 30 U.S.C. (Supp. II) §813 (a). While the coal mining industry has been highly regulated, at least in health and safety matters, for many years, the limestone quarrying business and others of the variety of operations under the Mine Act, do not have such a regulatory history. It is therefore not reasonable to exempt them from the protections offered by the warrant requirement.

The warrantless inspections authorized to enforce the Mine Act are not reasonable on other grounds.

First, the public interest to be served by the Mine Act, the health and safety of employees of operations coming within the purview of the Act, does not mandate warrantless inspections to accomplish its purpose. Second, the public interest is broad based and inconsistent with the rule stated in *Marshall* v. *Barlow's Inc.*, 436 U.S. at 313, that exemptions from the warrant requirement are to be the exception and not the rule. Third, a warrant based on the administrative probable cause standard adopted in *Camara* v. *Municipal Court,* 387 U.S. 523 (1967) provides the businessman with valuable and practical protections from governmental intrusion. The privacy interest of the operator is not otherwise adequately protected under the statute.

ARGUMENT

§103(a) OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, INSOFAR AS IT AUTHORIZES WARRANTLESS INSPECTIONS OF ALL OPERATIONS CLASSIFIED AS "COAL OR OTHER MINES" UNDER THE ACT, VIOLATES THE FOURTH AMENDMENT PROHIBITION OF UNREASONABLE SEARCHES.

During the past several decades, supervision and inspection of dwelling places, business entities and public facilities by regulatory agencies at all levels of government have increased dramatically. These agencies are charged with making and enforcing rules advancing various public interests recognized by Congress and other legislative bodies. From a home remodeler to a nuclear power plant operator, from airplane passengers to owners of automobiles, from Exxon and AT&T to the "mom and pop" business operator, almost no citizen or business is exempt from exposure to some form of governmental inspection. As the authority of these regulatory bodies has extended to control our personal and business lives in ever greater detail, this Court has on several occasions undertaken the difficult task of reconciling the public interests served by the enforcement of statutes and rules administered by the agencies with the rights guaranteed by the United States Constitution.

The reasonableness of warrantless intrusions onto private property for regulatory purposes such as health and safety inspections has proved to be a recurring problem. The issue has been examined in a series of cases beginning with *Frank* v. *Maryland*, 359 U.S. 360 (1959), and culminating twenty years later in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1979).

This case raises again the right of a property owner, and especially a business property owner, to insist that a regulatory inspection of business premises be conducted in accordance with a warrant. In every significant way, this case very closely resembles *Barlow's*. Factually, the cases are nearly identical. Both cases were brought about by the refusal of permission to a federal inspector to conduct a health and safety inspection of business premises without a warrant. In both cases, such warrantless inspections were authorized by statute, Section 8(a) of the Occupational Health and Safety Act (hereinafter OSHA), 29 U.S.C. 657(a) (1970), in *Marshall* v. *Barlow's, Inc., supra,* and §103(a) of the Federal Mine Safety and Health Act of 1977 (hereinafter Mine Act), 30 U.S.C. (Supp. II) 813 (a), in this case. Both statutes were intended to improve health and safety standards in the nation's workplaces. See 29 U.S.C. 651 and 30 U.S.C. 801.

In *Barlow's,* the Secretary argued unsuccessfully that:

1. The Congressional construction of the Fourth Amendment represented by the warrantless search provision in the statute should not be rejected.

2. The businesses subject to warrantless inspections under the statute were pervasively regulated and therefore not protected by the warrant requirement.

3. The enforcement scheme required warrantless searches in order to be effective.

4. The incremental protections afforded the employer's privacy are so marginal that they failed to justify the administrative burdens that may be entailed.

5. The decision to require a warrant for OSHA searches would render the warrantless search provisions in other statutes constitutionally infirm.

With the exception of the last point, these are precisely the same arguments made by the Secretary in the instant case. Not surprisingly, the Secretary insists that *Marshall* v. *Barlow's, Inc., supra,* does not control this case, but looks to an earlier case, *United States* v. *Biswell,* 406 U.S. 311 (1972). For the reasons stated below, the analysis of *Barlow's* supplies the proper framework for deciding this case, and leads to the conclusion that §103 (a) of the Mine Act, insofar as it authorizes warrantless searches of appellees' stone quarry, violates the Fourth Amendment prohibition of unreasonable searches.

A. The Court's Holding in Marshall v. Barlow's, Inc. Formulates the Principle Justifying Warrantless Inspections of Certain Business Premises in Accordance with the Exceptions to the Warrant Rule Found in Colonnade Catering Corp. v. United States and United States v. Biswell.

1. The Historical Development of the Rationale Justifying Warrantless Inspections of Business Premises in Certain Situations Culminated in the Analysis Contained in Marshall v. Barlow's, Inc.

The issue of the constitutionality of warrantless administrative searches first crystallized in *Frank* v. *Maryland,* 359 U.S. 360 (1959), in which a conviction was upheld for refusing to permit a warrantless inspection of a residence by a health inspector. Stressing the need for enforcement of minimum housing standards, the Court found such searches sanctioned by long historical acceptance, and by safeguards to residents provided by the Maryland statute. The Court found criminal-type proceedings where a warrant is required to be totally unlike inspections pursued for the protection of the community's health, and that effective enforcement of health and safety standards required a flexible basis inconsistent with the rigorous standards demanded by the Fourth Amendment. Rather than loosen

those standards for administrative inspections, *Frank* excluded such searches from the warrant requirement altogether. *Id.* at 373.

Eight years later, *Frank* was overruled in *Camara* v. *Municipal Court,* 387 U.S. 523 (1967), and its analysis of the rights affected by administrative searches expressly rejected. In *Camara,* it was recognized that the Fourth Amendment protects, not only persons subject to police searches for evidence of criminal violations, but the right of all persons to be free from governmental intrusions onto their private property. (*Id.* at 530.) The requirement of a warrant restricts the scope of a search and provides notice to the property owner or occupant of the authority for and limits of the search, and was found to apply to administrative searches such as health inspections. (*Id.* at 532.) However, the Court in *Camara* revised its view of probable cause requirement for administrative warrants. In light of the lesser intrusion attendant upon such searches and the need to permit inspection procedures to be carried out in a systematic manner, a lesser standard of probable cause was found to support the issuance of administrative warrants. (*Id.* at 538-539.) Although, as a practical matter, the effect of both the *Frank* and *Camara* decisions was to permit inspections to be conducted where no specific violation was suspected, the adoption of the *Camara* approach had two highly significant implications. First was the recognition that there exists an important right to be free of unreasonable intrusion by governmental officials even when such intrusion has as its purpose implementation of health, safety and other rules admittedly beneficial to the public interest. Second was that the functions served by warrants are useful and indispensable, even where a lesser standard of probable cause suffices to justify their issuance. The reaffirmation of the importance of the warrant requirement in *Camara* clearly demonstrates the perception that a war-

rant does not become an empty gesture in the regulatory context.

Camara, like *Frank,* involved a resident charged with refusing to permit a city inspector to enter his dwelling. In *See* v. *City of Seattle,* 387 U.S. 541 (1967), a companion decision decided simultaneously with *Camara,* it was held that warrants are required for administrative searches, not only of residences, but also of private business property. (*See* v. *Seattle* at 545.) The Court expressly reserved the question whether the rule of *Camara* and *See* would apply to such situations as inspections required prior to issuance of a license as part of a comprehensive regulatory scheme. (*Id.* at 546.)

The application of the rule of *See* to a highly regulated and licensed business was directly addressed thereafter in *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72 (1970) in which the issue was the lawfulness of a warrantless inspection of a catering company which held a state liquor license and federal tax stamp. The Court found that, because such searches for the purpose of protecting the government's interest in liquor tax revenues had been permitted from the time the Fourth Amendment to the U.S. Constitution was adopted in the eighteenth century, they were not unreasonable.

Similarly, in *United States* v. *Biswell, supra,* 406 U.S. 311, a warrantless search of a pawn shop, whose operator was federally licensed to sell guns, performed in accordance with the Gun Control Act of 1968, 18 U.S.C. §921, et seq., was approved in view of the vital public interest in controlling the interstate distribution of weapons.

Both *Colonnade* and *Biswell,* as the Court has since recognized, were responses to "relatively unique circumstances." (*Marshall* v. *Barlow's, Inc., supra,* 436 U.S. at

313.) Neither *Colonnade* nor *Biswell*, encompassing, as they did, such limited fact situations, considered the more general question of what sort of business might be exempt from the requirement that administrative searches be conducted in accordance with a warrant. This broader issue was reached in 1979, in *Marshall* v. *Barlow's, Inc., supra*, a case involving the refusal of the owner of an electrical and plumbing installation firm to permit a warrantless inspection of his business premises under the Occupational Health and Safety Act. In dramatic contrast to the narrowly drawn circumstances justifying a warrantless search in *Colonnade* and *Biswell*, the statute in *Barlow's* purported to confer powers on OSHA inspectors to search virtually every business place in America without a warrant. The Court found that, despite the importance of the purpose to be served by the provision, namely, protection of the health and safety of workers, warrantless seaches under that statute could not be permitted consistent with the Fourth Amendment. In reaching this conclusion, the Court considered its previous decisions in *Colonnade* and *Biswell* and formulated a more general method for determining when an administrative search may be conducted without a warrant.

Marshall v. *Barlow's, Inc., supra*, 436 U.S. 307, addressed two aspects of the issue: first, whether the statute authorizing the search pertains to pervasively regulated industries, to which the warrant requirement does not apply, and second, the reasonableness of warrantless searches in view of the public interest to be served by the inspection, and the expectation of privacy of the property owner. A careful examination of the opinion, in light of the policies developed in the earlier cases, suggests that these are related ways of identifying the unique characteristics distinguishing those circumstances where warrantless administrative searches are permissible.

2. The Element Distinguishing Those Businesses Excepted From the Fourth Amendment Warrant Requirement is a Long Tradition of Close Government Supervision.

While stating that an exception to the search warrant requirement has been recognized for certain closely regulated businesses, the Court in *Barlow's* declined to so characterize the businesses covered by OSHA as a class. *Marshall* v. *Barlow's, Inc., supra,* 436 U.S. at 314. The Secretary's argument that "all businesses involved in interstate commerce have long been subjected to close supervision of employee safety and health conditions," was rejected on the basis that *federal* involvement in regulating employee working conditions "has never been of that order of specificity and pervasiveness that OSHA mandates." (436 U.S. at 314.) By implication, OSHA itself failed to provide the necessary foundation for finding that Barlow's business fell into the category of closely regulated industries of the type involved in *Colonnade Catering Corp.* v. *United States, supra,* 397 U.S. 72, and *United States* v. *Biswell, supra,* 406 U.S. 311.

In *Barlow's,* the Court clearly stated the distinguishing factor by which such businesses can be identified:

> "The element that distinguishes these enterprises from ordinary businesses is a *long tradition of close government supervision,* of which any person who chooses to enter such a business must already be aware." (436 U.S. at 313.) [Emphasis supplied.]

Contrary to the approach taken by the Secretary in his brief in this case, this standard does not divide the *Biswell* and *Colonnade* criteria into two separate tests, historical regulation and urgent federal interest. Rather, the cases illustrate a common principle, namely recognition of the

distinctive factors identifying such closely regulated industries.

In *Colonnade*, the unique history of government regulation of the liquor industry, to further a public purpose which Congress had long been "most solicitous" to protect (*Colonnade Catering Corp.* v. *United States*, *supra*, 397 U.S. at 76), led to the conclusion that Congress could by statute permit warrantless inspections of such businesses.

On the other hand, in *United States* v. *Biswell*, 406 U.S. 311 (1972), the pressing public interest served by enforcement of the Gun Control Act of 1968, 18 U.S.C. §921 et seq., was the focus of attention. Although the history of governmental regulation of firearms was found to be "not as deeply rooted in history as governmental control of the liquor industry," (*Id.* at 315), such history was not entirely lacking. See, for example, the National Firearms Act of June 26, 1934, ch. 757, 48 Stat. 1236. *Biswell* was based on and intended to be consistent with *Colonnade*. (*Biswell*, 406 U.S. at 314.)

Despite their difference in emphasis, then, these two cases illustrate applications of the same principle, which was definitively enunciated in *Marshall* v. *Barlow's, Inc.*, *supra*, 436 U.S. at 313.

B. All Businesses Regulated by the Mine Act Are Not Subject to Warrantless Inspections as Pervasively Regulated Industries.

Applying the teachings of *Biswell*, *Colonnade* and finally *Barlow's*, we find that the warrantless search provision contained in §103(a) of the Mine Safety and Health Act subjects to warrantless search businesses which cannot be accurately described as pervasively regulated for pur-

poses of the exception to the Fourth Amendment warrant rule.

1. The Regulatory History of Coal Mining Does Not Provide a Basis for Treating All "Coal or Other Mines" as a Single Pervasively Regulated Industry.

The Act covers businesses far beyond those usually thought of as mines, and occupations even further removed from what is usually thought of as mining activity.[1]

Like OSHA, the Mine Act brings a large number of disparate occupations and businesses under its umbrella for purposes of protecting the health and safety of workers in these industries, as Congress intended.[2] It is not directed

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[1] 30 U.S.C. 802(h)(1) provides:

" 'Coal or other mine' means:

(A) An area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted through workers underground,

(B) Private ways and roads appurtenant to such area, and

(C) Lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailing ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this chapter, the secretary shall give due consideration to the convenience of the administration resulting from the delegation to one assistant secretary of all authority with respect to the health and safety of miners employed at one physical establishment;"

[2] ". . . it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor or inclusion of a facility within the coverage of the Act." No. 95-181, 95th Cong., 1st Sess. (1977), p. 14.

to a single industry, as the Secretary insists, but many industries.

One of these industries, coal mining, has been found to be pervasively regulated so as to permit warrantless searches for the purpose of mine safety inspections. *Youghiogheny and Ohio Coal Company* v. *Morton*, 364 F. Supp. 45 (S.D. Ohio 1973).

Appellees recognize that coal mines have been subject to very comprehensive health and safety regulation for many years. (*Id.* at 49.)

However, the necessary long history of pervasive regulation for the entire group of enterprises governed by the Mine Safety Act may not be based on this experience of a single member of the group. The rule that exceptions to the warrant requirement must fall within "certain well-defined classes of cases," does not permit such a construction. *Camara* v. *Municipal Court, supra,* 387 U.S. at 528-9, *Marshall* v. *Barlow's, Inc., supra,* 436 U.S. at 313. Furthermore, the reasonableness of warrantless searches in pervasively regulated industries rests on the principle that,

> ". . . The businessman in a regulated industry in effect consents to the restrictions placed upon him. *Almeida-Sanchez* v. *United States,* 413 U.S. at 266, 271, 37 L.ed.2d 596, 93 S.Ct. 2535 (1973)." *Id.* at 313.

Obviously, the operator of a limestone quarry does not, by conducting his business, consent to the restrictions long ago placed on coal mine operations.

The constitutional rights of operators in such industries cannot be defined into nonexistence by a Congressional decision to call them "mines." As the district court noted in *Youghiogheny,* (*id.* at 52), Congress is not free to suspend constitutional protections by legislative enactment.

The regulatory history of coal mining is not engrafted onto other industries by such definitional sleight of hand. The Ninth Circuit put it another way in *Marshall* v. *Wait,* 628 F.2d 1255 (1980):

> "While we accord Congress great deference in matters within its constitutional competency, we cannot allow it to determine by statutory definition the privacy expectations of American citizens. It is the duty of this court to preserve the constitutional values embodied in the Bill of Rights. In this day of everincreasing federal health and safety regulation, it is especially important that we view encroachments upon individual privacy with exacting scrutiny." p. 1259.

2. Pervasive Regulation Covers All Aspects of a Business Operation.

It is questionable whether health and safety regulations alone, no matter how detailed, constitute genuinely pervasive regulation. It may be accurately said that the distribution of firearms and alcoholic beverages are pervasively regulated in that almost every aspect of their operation is subject to governmental oversight because of the public interest in controlling the products involved in these businesses. In those industries regulation encompasses such diverse matters as hours of operation, limitations on pricing and sales, labeling and advertising, licensing of premises and employees, for example. The requirement that such businesses be licensed, thereby giving the licensing authority control over the very existence of the enterprise, is a trait of such "pervasively regulated" businesses.

3. Waukesha Lime and Stone Is Not a Pervasively Regulated Business.

Waukesha's ability to do business is not dependent upon any license, state or federal. It is subject only to those

kinds of regulations covering most businesses, including tax, zoning, environmental rules and, of course, regulations protecting the health and safety of its employees.[3] In these respects, Waukesha Lime & Stone is in no different position than Barlow's, Inc. and the other companies covered by OSHA. Like those companies, Waukesha has no "long tradition of close government supervision" which characterizes industries which may be made subject to warrantless inspections.[4]

C. The Public Interest in the Health and Safety of Workers Protected by the Act Does Not Require Abandonment of the Protections to the Mine Operator Provided by a Warrant.

The health and safety of our country's workers is undoubtedly an important and appropriate target of governmental interest, as Congress recognized in its similar statements of findings and purpose in OSHA (29 U.S.C. §621), and the Mine Act (30 U.S.C. §801). But to say that an industry or occupation is hazardous is insufficient, by itself, to justify waiver of the protections of the Fourth Amendment. In the Mine Act, as in OSHA, provision for warrantless searches of premises subject to the health and

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[3] In his brief, the Secretary incorrectly states that stone quarries like Waukesha's have been subject to warrantless search by State officials since 1922. This is not the case. Stone quarries, like *all* Wisconsin businesses, are subject to certain inspections. There are no statutory provisions authorizing warrantless inspections. In fact, §§66.122 and 66.123, Wis. Stats., specifically provide for special inspection warrants to be used in making health and safety inspections.

[4] Similarly, the sand and gravel industry which also comes within the Act's purview lacks a long or extensive history of regulation. *Marshall* v. *Nolichucky Sand Co., Inc.*, 606 F.2d 668, 673 (5th Cir. 1979) and *Marshall* v. *Texoline Co.*, 612 F.2d 693, 698 (6th Cir. 1980), cert. den. 446 U.S. 935.

safety regulations in these statutes were thought necessary by Congress for effective enforcement of those acts. Nevertheless, the purpose to be served by warrantless inspections under the Mine Act does not demand the imposition of this extraordinary enforcement tool.

1. The Public Interest in the Health and Safety of Mine Workers Is Part of a Broad-based Interest in the Protection of All Workers.

The governmental interest is too broad to serve as an appropriate basis for the denial of Fourth Amendment protections. The health and safety of *all* employees in American work places is a matter for governmental concern. The interest to be served in this case is identical to the interest advanced by OSHA, differing perhaps in degree, but not in kind. As worthy as this concern may be, this Court has already found that it does not alone override the important policies served by the warrant requirement. (*Marshall* v. *Barlow's, Inc., supra,* 436 U.S. at 324.

While the scope of the Mine Act is narrower than that of OSHA, it does not focus on specific problems that can only be reached using a warrantless inspection procedure. Such a narrow focus is necessary if warrantless searches are to be confined to the "relatively unique circumstances" described in *Marshall* v. *Barlow's, Inc., supra,* 436 U.S. at 313.

2. The Public Interest Need Not Be Frustrated by Requiring Warrants for Inspections Under the Act.

The health and safety of workers need not be jeopardized by requiring a warrant for inspections under the Act. The "urgent interest" to be advanced by permitting warrantless inspections stems from the need perceived by Congress

for *unannounced* inspections. Congress, and the Secretary, appear to assume that unannounced inspections are impossible or impractical where a warrant is required. This is not the case.

Warrants are usually issued ex parte. If, upon a mine operator's refusal to permit inspection, a warrant is to be sought, the time and date on which the warrant is to be executed need not be made known to the operator. *Marshall* v. *Barlow's, supra,* 436 U.S. at 320. Where it is anticipated that consent will not be given for a search, warrants issued in accordance with an administrative plan based on specific neutral criteria can be obtained by inspectors in advance of the planned inspection. Such warrants would not be mere empty gestures, but would serve the valuable purposes of assuring operators of the authority for the search and of advising the owner of the scope and objects of the search.

The necessity for such protections is graphically illustrated in the present case. The inspector failed to make his presence known for more than an hour after his arrival. He was not accompanied by Waukesha representatives while on the company's premises. He failed to notify the appropriate company officials of the purpose of his visit. (J.A. 51, Dewey deposition, p. 22.)

The necessary "flexibility as to time, scope and frequency" described in *United States* v. *Biswell, supra,* 406 U.S. at 316, do not demand that inspection by warrant be abandoned. Here, as with the routine inspections in *Camara* v. *Municipal Court, supra,* 387 U.S. 523 at 539, ". . . there is no compelling urgency to inspect at a particular time or on a particular day. . ." This is underscored by the fact that the statute mandates only two inspections per year for operations like Wau-

kesha's, and the lack of urgency suggested by the lapse of seven months from the time Mr. Dewey refused permission to inspect Waukesha's premises to the filing of the Secretary's request for injunctive relief.

3. A Warrant Provides Necessary Protection for the Operator Not Otherwise Adequately Available Under the Statute.

The statute does not provide other adequate safeguards for the rights of the mine or quarry operator. Under the Act and its accompanying regulations, refusal to permit entry constitutes a violation punishable by a fine. 30 U.S.C. §§814, 820, and penalties may be levied before any neutral review takes place, which is exactly what happened in this case.[5] In addition, the avenue for review by a judicial officer, the action for injunctive relief, may not be invoked by the operator, but only by the Secretary.

In addition, the Act does not provide adequate standards to ensure that the warrantless inspections performed pursuant to its provisions are conducted consistent with reasonable legislative or administrative standards. While the Act provides for a minimum number of inspections per year, no maximum is set. The manner in which such inspections are to be conducted, standards for inspector conduct, and criteria for determining the frequency and

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[5] Upon refusal by appellee Dewey to permit Inspector Brey to inspect the non-public areas of Waukesha's premises and prior to the Secretary's commencing an action for an injunction, Waukesha received a citation from the Secretary resulting in a fine of $1000. Waukesha's appeal of this citation is presently before the Mine Safety and Health Review Commission. *Waukesha Lime and Stone Co., Inc.* v. *Secretary of Labor,* FMSHRC Docket No. VINC 79-66-PM The Commission has stayed action pending the decision of the Supreme Court in this case.

scope of inspections are left to the "unbridled discretion" of the inspector in the field. This is precisely the evil fostered by a warrantless search. *Marshall* v. *Barlow's, Inc., supra,* 436 U.S. at 322; *Camara* v. *Municipal Court, supra,* 387 U.S. at 532; *See* v. *Seattle, supra,* 387 U.S. at 545.

In his brief, the Secretary raises the specter of federal courts being swamped with requests for over 100,000 inspection warrants per year. He also suggests that this would impose overwhelming additional burdens on U.S. Attorneys. Yet the Secretary has not shown or even asserted that district courts and/or U.S. attorneys have been overburdened by the inspection warrant requirements in OSHA matters mandated by this Court's decision in *Barlow's.* Further, the Secretary seems to assume that warrants will have to be obtained for all Mine Act inspections. As the Court said in *Marshall* v. *Barlow's, supra,* 436 U.S. at 317, ". . . the great majority of businessmen can be expected in normal course to consent to inspection without warrants; the Secretary has not brought to this Court's attention any widespread pattern of refusal." The protections afforded by the Fourth Amendment should not be eliminated to prevent administrative inconvenience, especially when the alleged burden is speculative at best.

The Secretary argues that Waukesha has ". . . consented to the interference with privacy interests imposed by warrantless inspections under the Mine Safety Act." (Brief of Secretary, p. 43.) As the basis for his argument, he asserts that Waukesha has long been subject to three invasions of its privacy which give rise to this "consent." They are alleged to be (1) warrantless state inspection since 1922, (2) warrantless federal mine inspections since 1966, and (3) federal explosives inspections since 1970. As it was demonstrated above, state inspections in Wis-

consin provide for warrants. The fact that Waukesha may not have requested them is of no aid to the Secretary. It can be said without fear of contradition that the Secretary cannot imply a waiver from a prior failure to request a warrant. Even if the federal inspections since 1966 have been with Waukesha's consent, it is not the law that a person or entity waives Fourth Amendment protection by permitting an inspection or search on some previous occasion. The nature and limited scope of the federal explosives inspections since 1970 are hardly sufficient to demonstrate Waukesha's consent to a much wider inspection under the Mine Act.

In short, Waukesha Lime and Stone simply does not fit into the narrow category of businesses with long histories of close government supervision excepting them from the warrant requirement of the Fourth Amendment. Warrantless searches of its premises under the Mine Act are not made reasonable because of the public interest served by the Act, which, though it may be furthered by *unannounced* inspections, does not require that *warrantless* searches be authorized. In view of these considerations, and the practical safeguards provided by a warrant to the operator, warrantless searches pursuant to the Mine Safety and Health Act of 1977 are not reasonable under the Fourth Amendment.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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